

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-193712

DATE: May 24, 1979

AGC00210

MATTER OF: Reimbursement by Central Intelligence
Agency of Employee's Legal Fees

DIGEST: Central Intelligence Agency (CIA), may reimburse its staff psychiatrist who was directed to prepare psychological profile of Daniel Ellsberg for cost of legal representation before congressional investigating committees and professional organizations if preparation of profile was within scope of employee's duties.

The Deputy Director of the Central Intelligence Agency (CIA) has requested our decision on whether the CIA has authority to reimburse Bernard M. Malloy, M.D., a staff employee psychiatrist, for fees incurred when he retained a private attorney to counsel him in connection with his appearance in various proceedings investigating actions by him within the scope of his employment.

According to the Deputy Director, Dr. Malloy "was summoned to appear before investigating committees" (presumably congressional committees) and was required to defend his professional conduct before the American Psychoanalytic Association, Washington Psychiatric Society, and the Medical Society of the District of Columbia, because a psychological profile of Daniel Ellsberg he had prepared in accordance with the instructions of his supervisors had been "misused by officials in the Nixon Administration."

The Deputy Director has stressed the fact that Dr. Malloy acted within the scope of employment. In his letter to our Office, he states:

"In no way can it be said that Dr. Malloy's difficulties in regard to these matters were of his own making. On the contrary, he exercised sound judgment by raising with the Agency's Director of Medical Services, the Deputy Director for Administration and with the Director of Central Intelligence the question as to whether the preparation of the particular profile at issue was an appropriate activity for the Agency to undertake. He received assurances that the profile to be developed was required in the interest of national security, permitting an assessment of the probability of continued leaks of information. He was directed

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to proceed, secure in the knowledge that the Director was personally monitoring developments in this case. * * *

Dr. Malloy was absolved of all charges of unprofessional conduct.

We have held that if it is in the best interest of the Government to defend an employee's conduct in a law suit arising out of actions taken in the scope of his employment, and representation by the Department of Justice is unavailable, appropriated funds may be used to pay legal expenses, including private attorney fees, incurred by the employee in the suit. 55 Comp. Gen. 408 (1975); 53 Comp. Gen. 301 (1973). Furthermore, in 44 Comp. Gen. 312 (1964), we held that it was proper for the United States to pay a contempt fine imposed on an agent of the Federal Bureau of Investigation who, on specific instructions of the Attorney General and in accordance with departmental regulations and instructions, declined to answer certain questions in violation of a Federal court order. The case was decided this way because the offense for which the agent was charged and fined "arose by reason of the performance of his duties as an employee * * * and his compliance with (departmental) regulations and instructions, and was without fault or negligence on his part." 44 Comp. Gen. at 314. Thus, it may be proper for an agency to reimburse its employee for legal fees or other expenses incurred as a result of actions taken within the scope of his employment.

The present policy of the Department of Justice is that it may, if certain conditions are met, provide representation for an employee of the United States in a State criminal prosecution, or a civil or congressional proceeding. 28 C.F.R. § 50.15 (1978). Representation by the Department may have been available, at least for the congressional investigations, and it would have been preferable to go first to the Department. However, the investigations and proceedings in which Dr. Malloy appeared were not litigation and therefore were not the kind of proceedings in which the Department of Justice, by statute, has exclusive authority to represent the interests of the United States. See 28 U.S.C. §§ 516-519 (1976). ~~In any case, the~~ CIA did not seek representation from the Department of Justice because of time constraints and stated that Government counsel was not available to assist. Dr. Malloy incurred approximately \$6,000 in legal fees.

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We recently permitted an agency to charge against its appropriation the expenses of defending an employee as a result of acts performed within the scope of his employment, when the acts resulted in an investigation in quasi-judicial administrative proceedings. The Department of Justice was not available for representation in this case because of the type of proceedings involved. We stated:

"* * * because the performance of the conduct was in furtherance of an agency function, the cost of an attorney may be considered a necessary expense incurred in performing that function."

B-127945, April 5, 1979.

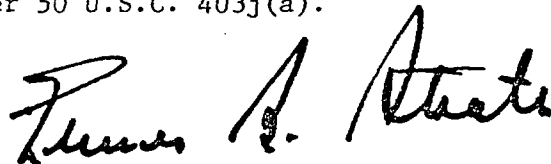
In the present case, the Deputy Director has determined that the performance of Dr. Malloy was in furtherance of an agency function. He states that the need for reimbursement--

"* * * arises directly from the performance of a unique manifestation of the Agency's national security functions.
* * * The performance of the intelligence mission and the expense incurred are directly linked. * * *"

Based on this determination that Dr. Malloy's activities were necessary to carry out the Agency's functions, the CIA has the authority under 50 U.S.C. § 403j(a) (1976), to reimburse Dr. Malloy for the legal expenses he incurred as a result. 50 U.S.C. § 403j(a) states:

"Notwithstanding any other provisions of law, sums made available to the Agency [CIA] by appropriations or otherwise may be expended for purposes necessary to carry out its functions * * *."

Accordingly, Dr. Malloy's legal fees may be considered a necessary expense for which CIA funds are available under 50 U.S.C. 403j(a).



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